IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22/08/2003

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THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL ORIGINAL PETITION No.23631 of 2002

R.Kumar ... Petitioner

-Vs-

M/s.Sundaram Chits (India) Limited,
rep. by Branch Manager, Srevalsan,
Chennai-14. ... Respondent

Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure for the relief as stated therein.

For petitioner : Mr.S.Narayanan.

For respondents : Mr.P.V.Sanjeev.

:O R D E R

The petitioner who is the accused in C.C.No.5942 of 1997 pending on the file of the VII Metropolitan Magistrate, George Town, Chennai has filed the above Criminal Original Petition seeking to set aside the order dated 18.7.2002 made in Crl.M.P.No.7016 of 2002 by the Court of VII Metropolitan Magistrate, George Town, Chennai on certain grounds as brought forth in the grounds of the petition.

2. The order which is sought to be set aside is one passed by the trial Court on a petition filed under Section 311 of the Cr.P.C. by the respondent herein before the trial Court alleging that it was very much essential to mark the Power of Attorney dated 17.6.1996, the order passed by the High Court of Kerala dated 31.7.1985 and the Form of Registration with Rules and Regulations, Statements of Accounts, further stating that on account of non availability of documents at the time of the chief examination they were unable to mark those documents and since only just before filing of the petition, in Crl.M.P.No.701 6 of 2002, they came to be in possession of those documents, further pleading that no prejudice would be caused to the other side in permitting the documents to be marked by the respondent who is the complainant before the lower Court the respondent has filed the said petition. It is this petition that the lower Court has allowed as per its order dated 18.7.2002 made in the said Crl.M.P. testifying the validity of which the respondent therein, who is the accused has come forward to file the above Criminal Original Petition.

3. The contentions of the petitioner/accused are that the learned Magistrate, without application of the mind that earlier his predecessor in office has passed an order in Crl.M.P.No.3381 of 2000, has passed the second order in Crl.M.P.No.7016 of 2002; that no such two orders could be passed on one and the same subject and hence the order dated 10.7.2002 made in Crl.M.P.No.7016 is illegal; that only to fill up the lacuna after an inordinate delay of passing the first order the respondent has come forward to file the second application for one and the same purpose and under one and the same section which is erroneous and liable to be set aside.

4. During arguments, the learned counsel appearing on behalf of the petitioner/accused would point out that it is a case registered under Section 138 of the Negotiable Instruments Act; that on a single memo filed, the lower Court has passed two orders one on 10.7.2002 and the other on 18.7.2002 allowing the same, which is erroneous and liable to be set aside. The learned counsel would cite a judgment at this juncture reported in RAJENDRA PRASAD vs. NARCOTIC CELL (1999)6 SUPREME cOURT CASES 110), wherein it is held that power under Section 311 of C.P.C. recalling the witnesses or re-summoning the witness cannot be exercised to fill up lacuna in prosecution case and would point out that there is a bar against filling up the lacuna as laid down in 1991 Supplemental (1) SCC 271.

5. Yet another judgment cited by the the learned counsel for the petitioner is one reported in M/S.DANDY KNIT GARMENTS AND ANOTHER vs. M/S.SUBIKSHA SPINNERS (P) LTD., (2000 CRI.L.J.624) wherein, also the same proposition has been held to the effect that the prosecution cannot be allowed to fill up lacuna by filing application under Section 31 1 and examining witnesses in support of the documents -- defects in prosecution cannot be cured by marking of a document at belated stage and examining witnesses in support thereof. On such arguments the learned counsel would pray to allow the above Criminal Original Petition setting aside the order dated 18.7.2002 passed by the lower Court in Crl.M.P.No.7016 of 2002.

6. In reply, the learned counsel appearing on behalf of the respondent would submit that the petitioners petition for discharge was dismissed on 2.5.2000 by the lower Court and that his petition to recall P.W.1 was allowed; that instead of cross-examining the witness, the petitioner has come forward to file the above Criminal Original Petition. At this juncture, the learned counsel would cite a judgment reported in BIPIN SHANTILAL PANCHAL vs. STATE OF GUJARAT AND ANOTHER (200 1)3 SUPREME COURT CASES 1) wherein it is held:

"It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. Such practices when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings".

Citing the above extract of the judgment of the Honble Apex Court, the

learned counsel would exhort that at any stage of trial, documents could be marked and would further state that even if there is a mistake it could be rectified and that there is no filling up lacuna in this case.

7. In consideration of the facts pleaded having regard to the materials placed on record and upon hearing the learned counsel for both, this Court is able to see that an application filed under Section 311 of Cr.P.C. by the respondent has come to be allowed by the trial Court for marking of certain documents in which respondent would come forward to allege that they were not able to gain access to the said documents and only then they came to be in possession of and since they are vital for the decision of the case in hand they have filed an application under Section 311 of Cr.P.C. for permitting them to mark those documents in evidence and the lower Court with due opportunity for parties to be heard has permitted the respondent to mark those documents. Aggrieved, the petitioner has come forward to file the above Criminal Original Petition seeking to set aside the order passed by the lower Court.

8. A cursory glance add into Section 311 of Cr.P.C. would prove that the section is positive in approach permitting the Court to entertain an application of that sort at any stage of any inquiry, trial or other proceeding under this Code, it may summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, if his evidence appears to it to be essential to the just decision of the case.

9. Regarding the ingredients of the second part of the above section is concerned it is mandatory and requires the Court to take any of the above mentioned in the first part of the section if the new evidence appears to be essential to the just decision of the court as it has been held in KEWAL GUPTA v. STATE OF H.P. (1991 CRI. L.J.(H.P)

10. In the above circumstances, the respondent has filed the application to examine the witness to mark the documents mentioned supra since they came to be in possession only then and therefore, the lower Court in its considered opinion falling in line with the expectations of law as enshrined under Section 311 of the Cr.P.C. has allowed the petition filed by the respondent and permitting the respondent to mark those documents in which this Court does not see any illintention or motive or filling up of the lacuna of the case particularly since the section is exhaustive in permitting any party to the proceeding to resort to the section. This Court is also not able to find any valid or tangible reason existing to cause interference into the well considered and merited order passed by the lower Court and hence the above criminal original petition filed by the petitioner seeking to set aside the said order only fails and it deserves only to be dismissed and hence the following order:

In result,

(i) there is no merit in the above criminal original petition and the same is dismissed as such;

(ii) the order dated 18.7.2002 made in Crl.M.P.No.7016 of 2002 by the Court of VII Metropolitan Magistrate, George Town, Chennai is hereby confirmed;

(iii) however, since being the long pending matter from the year 199 7, a further direction is issued to the trial Court to expedite the remaining trial procedures so as to deliver the judgment on merits and in accordance with law at any cost not later than three months from the date of receipt of this order.

Index: Yes
Internet: Yes

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To
1. The VII Metropolitan Magistrate, George Town, Chennai.
2. The Public Prosecutor, High Court, Madras.